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THE INDIAN PENAL CODE AND ABSOLUTE PRIVILEGE.

THE Code which has been pronounced to be a marvel in the art of codification and a monument to the legal attainments of Lord Macaulay has left open the much vexed question as to whether the law of absolute privilege applies in India to defamatory statements made by Judges, counsel, witnesses and parties in the course of a judicial trial. Judges of eminence whose legal attainments cannot be gainsaid have held that the authors of the Code never intended to depart from the doctrine of absolute privilege prevailing in the English law. Judges of equal eminence have held a contrary opinion. It would be presumptuous on our part to agree with or dissent from either set. The generality of those who have held the former view have done so on the basis that a doctrine founded on public policy and expediency cannot be presumed to be abrogated by mere silence. The latter proceeding on definite canons of interpretation hold the Code complete and not liable to be added to by any facile reasoning based on public policy. We shall attempt to probe into the intentions. of the authors of the Code with such materials as we have at our disposal, untrammelled by considerations which guide those speaking *ex cathedra*. The question whether the authors of the Code intended to depart from the principles of the English law can best be approached by considering in what other respects the provisions of the Code differ from the English law of defamation.

(*a*) The reason why defamation is made penal in England is because of its tendency to provoke a breach of the peace. The authors of the Code entirely repudiate this doctrine and penalize defamation exclusively on the ground that it tends to injure the individual. Now in departing from a principle, otherwise immaterial, in codified law the authors proceed to support their views in an elaborate note justifying the departure. (Note R.).

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(*b*) Again in England a libel alone is made a criminal offence but defamation by spoken words is not penalized. The Code makes no distinction between written and spoken defamation. The authors attempt to justify this departure by very cogent reasoning and conclude: "On the whole we are so far from being able to discover any reason for exempting any mode of defamation that we have not even thought it right to provide different degrees of punishment for different modes of defamation."

(*c*) At the time when the Code was drafted the truth of an imputation could not be pleaded as a defence to an indictment for libel, and if pleaded the Court could not allow evidence of truth to be adduced. But the authors of the Code proposed the first exception to the law of defamation in India thus: "It is not defamation to attempt to cause anything which is true to be believed in any quarter concerning any person." As to this, they observe: "It is opposed to the rules of the English criminal law. It goes, we fear, beyond what even the boldest reformers of English law have proposed." They then devote several pages of close print in support of this reform, mostly based, be it noted, on grounds of public policy and expediency.

It seems clear enough that the authors of the Code had constantly before them the English law of defamation and whenever they thought fit to depart from it they did so after a long and anxious consideration. A perusal of Note R shows further that grounds of public policy and expediency, on which the doctrine of absolute privilege rests, entered largely in the drafting of the law and yet it is true that they do not deal with the question of absolute privilege, nor is there a hint that they had the question before them. It is incredible that if they intended to abolish the privilege in India they should have done so with contempt of silence when alterations of the English law on less important matters were sought to be justified by elaborate reasoning. If the remaining exceptions were intended to dispose of the whole question of privilege absolute and qualified with a conscious desire to abolish absolute privilege in India one would expect something more than the bare remark, "The remaining exceptions will not require so long a defence." We cannot but agree with Sir Arnold White when he observes: "It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English Law with regard to the question of absolute privilege; it seems to

me that in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference." We must respectfully dissent from the criticism of this passage in the latest pronouncement of the Full Bench of the Madras High Court*. The learned Judges say: "We agree with Sir Arnold White, Chief Justice, that these matters must have been present to the mind of the draftsman. We differ from him in the inference to be drawn from the silence of the statute regarding them. It seems to us inconceivable that that silence can be interpreted otherwise than as a deliberate refusal to incorporate that part of the Common Law of England into the law of India." But when on matters of comparatively small moment, we find a departure expressly mentioned and justified, it is not easy to infer an intention to abolish the doctrine of absolute privilege which in every country is one of supreme consequence to those discharging public functions, by a provoking silence. The question, however, does not rest on mere inference.

The spirit with which the drafting of the Code was undertaken may well be judged from the following remarks : " We are perfectly aware of the value of that sanction which long prescription and national feeling give to institutions. We are perfectly well aware that law-givers ought not to disregard even the unreasonable prejudices of those for whom they legislate." Remembering that the Code was intended to govern even the Englishman to whom the defence of absolute privilege would be more necessary in those days than to the Indian it seems incredible that men steeped in the constitutional doctrines of their country should have intended to abrogate that privilege without a word of justification.

Two propositions seem to us, however, indisputable. First that the Code was meant to embody the whole Penal Law of the country,and secondly, that the defence of absolute privilege, as it is understood to-day, does not find a place in the Code. It is this apparent contradiction between the intention and execution that is at the root of the opposing views on the question. Those who have seen the intention have denied the completeness of the execution. Those who have seen the execution to be complete have denied the intention. The solution lies in reconciling both and it will be found in an inquiry as to how the doctrine of absolute privilege was understood in England up to the time of *Munster* v. *Lamb* in 1883 (1).

*(1926) 51 M L J 112 (F B).

1. (1883) 11 Q B D 588.

Any one perusing the report of the argument of counsel for plaintiff will find authorities quoted in support of both absolute and qualified privilege but the state of the law is well summarised by Brett, M. R. thus: "But it has been suggested that only some of these classes of persons can successfully claim the privilege of the occasion, and those are Judges, parties and witnesses who make statements without malice and relevancy; and that those Judges, parties and witnesses, who either speak or write without relevancy and with malice, cannot successfully claim the privilege of the occasion. *I am inclined to think that with regard to these classes of persons the law has not been always stated in the same manner by the Judges, and some Judges have a strong objection to carry the privilege beyond the point to which they are obliged by authority to carry it; they are disinclined to admit the existence of the privilege. Other Judges are inclined to carry the privilege to its full extent, and we must see what is the doctrine which has been finally adopted.*" He then refers to *Revis* v. *Smith* (2) and to *Henderson* v. *Broomhead* (3) as having settled the law of absolute privilege regarding witnesses, and to *Scott* v. *Stansfield* (4) as to Judges. As to counsel, the decision from which we have quoted was itself the first that settled the question of absolute privilege. If such was the state of authorities in England it is very probable that the authors of the draft in 1837 and of the second report in 1843 did not think that the privilege of those connected with proceedings in a Court of law extended in England beyond the provision in the Code.

The probability thus alluded to is confirmed by what the Commissioners say in their Second Report, para. 405 : " The exceptions from the 5th to the 9th appear to be embraced in articles 11 and 14 of Chap. XVI of the Digest of the English Criminal Law Commissioners in which are described the publications that are held to be "*justifiable either absolutely or in a qualified manner in respect of the occasion.*" Art. 14 would seem also to cover the 2nd and 3rd exceptions as it justifies publications made *bona fide* for the benefit of any party or of the public or with a view to the discussion of any acts, measures or proceedings affecting the public or otherwise howsoever any party of the public having an interest in the making or receiving of such communications."

We regret we have not been able to procure the Digest referred to for comparing the provisions in the two Codes, but

2. (1856) 25 L J C P 195.
3. (1859) 28 L J Ex 360.
4. (1868) 37 L J Ex 155.

the above excerpt of the report seems fairly to indicate that the Commissioners thought they were providing for cases of *absolute privilege* as it then was in England, as well as that they did not intend to provide a different law for India.

It may be of interest to note one other point leading to the same conclusion. When the draft of the Code was circulated for opinion there was no stronger opponent of the bill than Mr. Norton, the then Advocate-General of Madras, and he does not appear to have thought that the provisions of the Code regarding privilege fell short of the doctrine of Absolute privilege in the English Law. The High Court of Madras is, however, of opinion that Judges are protected by the provisions of S. 77, Indian Penal Code. That section in our view provides for acts done with or without jurisdiction or in excess of jurisdiction, acts such as arrest, imprisonment, malicious prosecution, etc. Such a provision, though not equally wide, finds a place in the English Law quite apart from the doctrine of absolute privilege as applied to the law of defamation. It would indeed be strange if a Judge were to allege as a defence to a charge of defamation that the law empowered him to defame another or that he *bona fide* believed he was so empowered. The law authorizes nobody to defame another but tolerates such a defamation in a Judge discharging judicial functions in the higher interests of the public. The illustration to Exception 7 shows that Judges are no more immune than anybody else connected with proceedings in a Court of law.

The foregoing investigation into the intentions of the authors of the Indian Penal Code ought to induce the legislature to no longer delay a reform which is long overdue.

In carrying out this reform the legislature will be carrying out the intentions of the authors of the Code who fully anticipated that such defects would be discoverable in the course of time. In recommending the acceptance of the Code to the Governor-General the Commissioners say: "Sometimes it will be found that a case has arisen respecting which the Code is silent: in such a case it will be proper to supply the omission. Sometimes it may be found that the Code is inconsistent with itself: if so, the inconsistency ought to be removed. Sometimes it will be found that the words of the law are not sufficiently precise: in such a case it will be proper to substitute others. Sometimes it will be found that the language of the law, though it is as precise as the language admits, is not so clear that a person of ordinary intelligence can see its whole meaning: in these cases it will be expedient to add illustrations,

such as may distinctly show in what sense the legislature intends the law to be understood, and may render it impossible that the same question, or any similar question, should ever again occasion difference of opinion. In this manner every successive addition of the Code will solve all the important questions as to the construction of the Code which have arisen since the appearance of the edition immediately preceding. Important questions, particularly about which Courts of the highest rank have pronounced opposite decisions, ought to be settled without delay; and no point ought to continue to be a doubtful point more than three or four years after it has been mooted in a Court of justice." The length of time since the question of absolute privilege was first mooted in the High Courts in India ought to induce the legislature to delay no longer in declaring either that they do not intend to alter the Code as the public policy and expediency which dictated the privilege is different in India, or that they are prepared to modify the law so as to bring it into conformity with the law in England.

The inconvenience of the present state of the law has been felt by all the High Courts but instead of recommending an alteration of the law the High Courts of Bombay and Burma have sought to modify its rigors by declaring that complaints ought to be thrown out unless the complainant makes out a *prima facie* case of malice. But this is to ignore the provisions of S. 105 of the Evidence Act which expressly throws the burden on the accused to prove *bona fides*, in the first instance. See *Queen-Empress* v. *Balkrishna Vithal* (5) (Fulton, J.).

Apart from the question of absolute privilege, we think it important that the law of qualified privilege should in no respect be different from that prevailing in England, where if the occasion is privileged the burden of proving malice is on the complainant. On this point too it is clear that the authors of the Code did not intend to modify the English Law for they say: "The burden of proof will sometimes lie on the person who has made the imputation and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down." But the Evidence Act throws the burden in all cases on the accused and does not permit of any exceptions.

MADRAS. F. S. VAZ.

5. (1893) I L R 17 B 573.

CUDDALORE, N. T.,
9th August, 1926.

To

THE EDITOR,
"THE MADRAS LAW JOURNAL,"
MADRAS.

SIR,

Last week's *Fort St. George Gazette* publishes the notification relating to the increase of pecuniary jurisdiction for the Judges of Courts of Small Causes for the trial of suits cognizable by such Courts up to the amount of Rs. 1,000. In that connection there is one point which does not appear to have been considered when Madras Civil Courts Act was sought to be amended by Act 18 of 1926 so far as the court-fee payable in respect of small cause suits up to Rs. 500 was concerned. The Court Fees Madras Amendment Act provided a scale lower than the court-fees payable for a original suit up to that amount. When the pecuniary jurisdiction was raised to Rs. 1,000 one would have expected that the legislature would have introduced a corresponding modification in Sch. I, No. 2 which prescribes the fee payable by altering Rs. 500 that occurs in that number to Rs. 1,000. Inasmuch as that has not been done, the question now arises whether in respect of claims in small cause suits for amounts going beyond Rs. 500 but up to Rs. 1,000 Court-fees have to be paid on the higher scale or on the lower scale. In the absence of an amendment to the Court Fees Act, the Courts will necessarily insist upon the payment of Court-fee on higher scale either on the excess amount or the entire amount. The principle underlying the payment of Court-fee on the lower scale for small cause suits up to Rs. 500 equally applies to such suits when the subject-matter does not exceed Rs. 1,000. It behoves the legislature therefore to bring about an amendment by altering "Rs. 500" to "Rs. 1,000" in the relevant number of the schedule referred to above, so that this hardship may be very soon removed.

Another point that arises in this connection is the payment of Vakils' fee for a small cause suit especially when the subject-matter may run up to Rs. 1,000. Rule 289 of the Civil Rules of Practice prescribes Rs. 5 as the fee recoverable by the party employing a pleader in suits under the Madras Provincial Small Cause Courts Act and Rs. 15 and 10 respectively for Advocates and Vakils who appear in such cases where

the judgment certifies accordingly. Even when the limit of Rs. 500 was in force this scale of fee was considered to be excessively moderate but now when the subject-matter is increased to Rs. 1,000 there is hardly any reason why the rule should continue as it is instead of suitable amendments being made to that rule so as to raise the amount at least to Rs. 35 or 50 as the case may be.

It is the earnest desire of the members of the Bar that suitable amendments to carry out the aforesaid objects may be introduced so as to obviate the inconveniences arising out of the altered situation.

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SUMMARY OF ENGLISH CASES

HOWELLS *v.* POWELL DUFFRYN STEAM COAL CO., LTD., (1926) 1 K. B. 472.

Workmen's Compensation Act—Accident—Arising out of and in the course of employment—Coach provided by employer for use of miners—Option to use—Liability for accident.

In a colliery the miners had to travel a distance of one mile up a mountain and to facilitate doing the journey the employer had provided a coach which would be dragged up the incline for the use of the miners. There was no obligation on the miners to use the coach, but they could do it if they liked. A miner lad coming for work travelled by the coach one day and while the coach was being dragged up the incline suffered injuries due to an accident, for which he claimed compensation. *Held,* he must be deemed to have entered on his employment as soon as he reached the premises and as the accident arose in the course of employment was entitled to compensation.

BROWNING *v.* CRUMLIN VALLEY COLLIERIES, LTD., (1926) 1 K. B. 522.

Contract—Mining service—Implied terms—Mine unsafe—Refusal of miners to work—Mine closed for repairs—Miner if entitled to wages.

Certain miners who were employed in a colliery found the shafts unsafe and refused to work till they had been made safe. The owners found on inspection that the shafts had become unsafe on account of natural decay and not due to any

negligence on their part and closed the mine while repairs were being carried on. The miners claimed a declaration that they were entitled to wages even during the period of non-service. *Held,* under the circumstances it must be taken to be an implied term of the contract of service that the owners would not be liable to pay wages during the period reasonably required to repair the shaft. Case-law referred to.

COHEN *v.* SELLAR, (1926) 1 K. B. 536.

Contract of marriage—Engagement ring—Marriage broken off—Return of ring.

An engagement ring is a conditional gift which is given as a token of marriage. If a woman who has received a ring refuses to fulfil the conditions of the gift she must return it. So on the other hand if the man has, without a recognised legal justification, refused to carry out his promise of marriage he cannot demand the return of the engagement ring.

Semble : If the engagement to marry be dissolved by mutual consent, then in the absence of a contract to the contrary the engagement ring and like gifts must be returned by each party to the other. If the marriage does not take place through either the death of, or through a disability recognised by law on the part of the person giving the ring or other conditional gift, a condition will be implied that the gift shall be returned. If the marriage actually takes place, then the engagement ring or like gift will, in the absence of an express agreement to the contrary, become the absolute property of the recipient and that property will not be divested by subsequent divorce.

Case-law discussed.

MARTIN *v.* LOWRY, (1926) 1 K. B. 550 : 95 L. J. K. B. 497.

Income-tax—Trade or business—Machinery merchant purchasing huge stock of linen—Disposal by sale within a few month—If amounts to trade or business—Annual gain—Meaning of—Income-tax Act, 1918, *Sch. D.*

A merchant engaged in the business of wholesale machinery purchased 45 million yards of the surplus stock of Government aircraft linen, under an agreement to pay for and take delivery within six months. He wanted to dispose it of in one sale, but failing to do so, he set up a large and skilled organisation for selling it in smaller quantities and within a period of seven months was able to dispose of the whole stock. He was sought to be made liable for Excess Profits Duty and

income-tax with respect to his profits. *Held*, by the Court of Appeal affirming Rowlatt, J., (1) he was carrying on a trade or business for the purpose of making profits and as such was assessable to Excess Profits Duty ; and (2) though the transaction was completed within seven months, his earnings amounted to " annual profits or gains " within the meaning of Sch. D (*a*) of the Income-Tax Act, 1918, and as such was assessable to income-tax. The word " annual " means only in the current year, occurring in the year of the assessment to taxation and does not imply an element of permanence resulting in the production of recurrent annual profits.

REED *v*. SEYMOUR, (1926) 1 K. B. 588.

Income-tax—Profits or gains—Benefit match for professional cricketeer—Gate money—Nature of—If assessable to tax.

A professional cricketeer of the Kent County Club was given a benefit match and the gate moneys invested by the trustees of the Club in some securities and the income paid to the cricketeer. On his retiring from the profession of an active cricketeer, the trustees of the club utilised the collections to purchase a farm for him. The question arose whether he was liable to pay income-tax. *Held*, the moneys did not represent an income, profit or gain, but a donation or a testimonial of an exceptional kind or a mere present and as such it was not assessable to income-tax.

METROPOLITAN TUNNEL AND PUBLIC WORKS, LTD. *v*. LONDON ELECTRIC RAILWAY COMPANY, (1926) 1 Ch. 371 : 95 L. J. Ch. 246.

Arbitration—Agreement to refer—Construction of contract—Question of law—Stay of proceedings—Arbitration Act, 1889, *S.* 4.

An agreement to carry on a railway construction containted a schedule of the prices to be paid for the various items of work, with an addition of "10 per cent. for general contingencies ". Every month payment was to be made for the work done and there was a clause for reference to an Engineer arbitrator questions relating to the construction or meaning of the contract. The question arose whether the monthly payments should also include the additional " 10 per cent. for contingencies ". The plaintiffs took an originating summons for construction of the agreement, whereupon the other party applied under S. 4 of the Arbitration Act for stay of proceedings. *Held*, by a majority of the Court of Appeal (Lord

Hanworth, M. R. and Scrutton, L. J., Sargant, L. J. dissenting) the onus was primarily on the plaintiffs to satisfy the Court that there were good grounds for not referring matters to arbitration and the matter being one relating to the technical meaning of the expression " general contingencies, " the question was not one of law for the Court to decide but for an Engineer arbitrator to decide under the terms of the agreement.

BOOTH *v.* THOMAS, (1926) 1 Ch. 397 : 95 L. J. Ch. 160.

Landlord and tenant—Lease of land—Landlord owner of adjoining land—Stream confined in culvert—Omission to repair culvert—Damage caused to lessee—Breach of covenant —Liability.

A natural stream ran through a piece of land and was enclosed by him in a culvert. He leased the adjoining piece of land on which some buildings stood, with the usual covenant for quiet enjoyment. The culvert was never kept in proper repair and as the result of a storm, the stream broke through the side of the culvert and washed away the slag on which a wall of the demised building rested, and the wall collapsed. The person in whom the lease then vested sued the then owner of the neighbouring land for damages. *Held,* by the Court of Appeal, the latter was liable as there was a breach of the covenant for quiet enjoyment. Just like an act of commission, the omission to keep the culvert in repair amounts to a breach of duty to a neighbouring landowner.

In re AUTOMATIC BOTTLE MAKERS, LTD. : OSBORNE *v.* AUTOMATIC BOTTLE MAKERS, LTD., (1926) 1 Ch. 412 : 95 L. J. Ch. 185.

Company—Debentures—General floating charge—Trust deed authorising issue of further charges " in ordinary course of business"—Second floating charge on specified assets—Validity of.

A company under the terms of a trust deed issued a series of debentures, creating a general floating charge on all its assets, but the deed reserved power to create in priority to such charge, such mortgages or charges for the purpose of raising moneys in the ordinary course of business by the deposit of " dock warrants, bills of lading, materials, products and stock. " Acting under this reserved power, the company raised another loan charging the abovementioned items but entitled to rank in priority to the prior floating charge created under the trust deed. *Held,* by the Court of Appeal the

second charge was valid and was entitled to priority over the first.

Per Warrington, L. J.—By creating a charge upon its assets generally by way of floating security, a company is not, in the absence of any stipulation to the contrary, prohibited from creating specific charges on specific portions of its assets in the ordinary course of business. There is no authority for the proposition that no floating charge, though upon a part only of the assets, would be allowed under the general law after creating a prior general floating charge on all its assets, both present and future.

MELZAK *v.* LILIENFELD, (1926) 1 Ch. 480.

Lease—Sub-lease by lessee—Covenants contained in, if incorporated—Sub-lease to contain only usual covenants—Breach of contract—Damages.

A professional musician agreed in writing to take an underlease from the defendants. He had no opportunity to know the terms of the lease to the defendants and when the latter knew that the premises would be used to give lessons in music, they refused to let the premises. *Held,* in an action for specific performance and damages, the musician was entitled to a sub-lease containing only the usual covenants and is not bound to accept one with the special restrictive covenants which may be contained in the head lease.

Although generally speaking if a purchaser has notice of a particular document he must be taken to have notice of its contents, yet in a contract for the sale of a lease or the grant of a sub-lease out of a leasehold interest, in each of which cases the proposed grantee has notice of the lease, the law is that in the absence of any term in the contract to the contrary, and in the absence of any evidence that the proposed grantee has in fact been made acquainted with the actual terms of the lease, the contract must be read and construed as in the one case a contract for the assignment of a lease containing the usual covenants, and in the other case, as a contract for the grant of a sub-lease out of a leasehold interest containing the usual covenants.

In re BLYTH SHIPBUILDING AND DRY DOCKS CO., LTD: FOSTER *v.* BLYTH SHIPBUILDING AND DRY DOCKS CO., LTD., (1926) 1 Ch. 494.

Sale of goods—Agreement to build ship—Payment by instalments—Ship partly constructed—Property when passes—Sale of Goods Act, 1893, *Ss.* 16, 18.

A contract to build a ship provided for payment of the price in instalments at fixed intervals according to the various stages of the construction. There was a clause in the agreement which provided that after the payment of the first instalment, "the vessel and all materials and things appropriated for her" should remain the absolute property of the buyer, subject to the vendor's lien for unpaid purchase money. The vessel had been partly constructed and some of the instalments paid, when at the instance of certain debenture holders of the shipbuilding company the question was raised in whom the property vested at that time. *Held,* by the Court of Appeal affirming the decision of Romer, J. the property in the uncompleted ship had passed to the buyers, but not the materials not actually built into the vessel. Meaning of the word "appropriated" discussed.

GREGG *v.* RICHARDS, (1926) 1 Ch. 521 : 95 L. J. Ch. 209.

Right of way—Sale of land—Body of document reciting right over a portion—Statement of right in habendum *as then existing—What passes.*

A sale deed contained a recital of the grant of a right of way described as coloured green on the attached plan. According to the plan this was four feet wide and formed only part of a wide roadway. Up to that time the vendor himself was enjoying a right of access over the whole width of the road and the ***habendum*** contained a general clause that all rights of easement then enjoyed by the vendor should pass to the vendee. The vendee claimed a right of way over the whole width of the road. *Held,* by the Court of Appeal reversing the decision of Russel, J. in (1926) 1 Ch. 102 the definite language of the ***habendum*** prevailed over the ambiguous description in the body, as limited by the plan and the vendee had a right of way over the whole road.

Per Pollock, M. R.—The maxim *expressio unicus exclusio alterius* is not a rule of law but only a canon of construction to be applied with great caution.

WILSONS AND CLYDE COAL COMPANY *v.* M'FERRIN, (1926) A. C. 377 : 95 L. J. P. C. 130.

Workmen's compensation—Arising out of and in the course of employment—Breach of statutory or other regulation—Act done for purposes of and in connection with employer's business—Liability—Workmen's Compensation Act, 1923, S. 7.

A workman who has arrogated to himself duties which he was neither engaged nor entitled to perform, whether the act which causes the injury is the subject of specific prohibition or not, is not entitled to compensation for injuries sustained while he is performing those duties, as S. 7 of the Workmen's Compensation Act, 1923, does not apply to such a case.

COMMISSIONERS OF INLAND REVENUE *v.* FISHER'S EXECUTORS, (1926) A. C. 395 : 95 L. J. K. B. 487.

Income—Supertax—Profits of company distributed to shareholders as debenture stock—Capital or income—Finance Act, 1910, *S.* 66.

A company which had earned large profits decided to distribute a part of it to its shareholders in the form of an issue of debenture stock to them and it was so done. On a question arising whether the shareholders were assessable to supertax upon it, *held,* by the House of Lords affirming the decision of the Court of Appeal in (1925) 1 K. B. 451 such stock was not income in their hands for purposes of assessment, but really an accretion to their capital. *Inland Revenue Commissioners* v. *Blott,* (1921) 2 A. C. 171 followed.

KIMBER COAL CO., LTD. *v.* STONE AND ROLFE, LTD., (1926) A. C. 414.

Shipping—Charterparty—Principal and agent—Signature by agent for named charterer—Demurrage to be paid by agent —Personal liability.

A contract of charterparty was entered into by the owner of a vessel with A. B. Co. described as the charterers. The contract was made in a printed form and the body of the form provided for demurrage being paid by the charterers. At the end in manuscript was added a clause that freight and demurrage would be paid at Glasgow by the Kimber Coal Co. and the charterparty was signed "For the A. B. Co., X of the Kimber Coal Co." The owners sued the Kimber Coal Company for demurrage. *Held,* the signature clearly indicated that the charterers were the A. B. Co., and the signatories were acting only as agents and hence the latter were not personally liable. The presumption arising from the form of the signature was not rebutted by the manuscript clause which only meant that the Kimber Coal Company as agents would pay.

MACLAINE AND CO. *v.* ECCOTT, (1926) A. C. 424.

Income-tax—Foreign firm—Exercising trade or profession within the United Kingdom—What amounts to—Agent arranging sales—Effect of.

In the case of a merchant's business, the primary object of which is to sell goods at a profit the trade is, speaking generally, carried on at the place where the contracts are made. In certain circumstances a reference to the place where payment is made for the goods sold or to the place where goods are delivered is a material consideration in deciding whether trade is carried on at a particular place. But the most important or crucial question is, where are the contracts of sale made ?

A Java firm having agents in London who arrange sales either directly or through brokers must be considered to exercise a trade within the United Kingdom within the meaning of the Income-tax Acts even though the goods are sent from Java direct to the purchasers wherever they may happen to be, and the price is sent to the firm at Java directly. But profits made on sales by the Java firm to non-resident persons, and which were not received by the agents in London are not liable to taxation.

ATTORNEY-GENERAL FOR ALBERTA *v.* COOK, (1926) A. C. 444 : 95 L. J. P. C. 102.

Divorce—Domicil—Decree for judicial separation—Effect of—New domicil of wife—Jurisdiction to grant divorce.

Under the English Law, so long as the married status continues the domicil of the wife is that of her husband. By obtaining a decree for judicial separation, a wife cannot acquire a domicil of choice apart from that of her husband and cannot in a Court of such domicil sue for divorce. Case-law elaborately discussed.

HIRJI MULJI *v.* CHEONG YUE STEAMSHIP CO., LTD., (1926) A. C. 497 : 95 L. J. P. C. 121.

Arbitration—Charterparty—Submission of disputes—Frustration of adventure—Effect of, on charterparty—Jurisdiction.

Under the terms of a charterparty a ship was chartered on certain terms for a period of ten months and it contained a clause for submitting to arbitration disputes arising out of the contract. During the term of the contract, the vessel was requisitioned by the Government and released only two years later. The charterer thereupon refused to take delivery of the vessel for the unexpired period of the term and the shipowner claimed to proceed under the arbitration clause. *Held,* the charterparty had come to an end as the result of the frustration of adventure caused by the Government requisition,

and there was no jurisdiction to refer any matter to arbitration.

HOYSTEAD *v.* TAXATION COMMISSIONER, 95 L. J. P. C. 79.

Estoppel by judgment—Admission of fact—Effect of.

The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact. The same principle applies not only to an erroneous admission of a fundamental fact but to an erroneous assumption regarding the legal quality of that fact.

In re ARMSTRONG : *Ex parte* LIPTON, 95 L. J. Ch. 184.

Bankruptcy—Trustee—Power to reject proof of debt by money-lender—Harsh and unconscionable bargain.

A trustee in bankruptcy has no power to reject proof of a debt given by a money-lender on the ground that the contract amounts to a harsh and unconscionable bargain. Such a power is vested in the Court alone.

In re A DEBTOR : *Ex parte* NEWBURYS, LTD., 95 L. J. Ch. 199.

Bankruptcy—Deed of assignment—Creditors asking for particulars of trustee—Standing by—Acquiescence—Bankruptcy Act, 1914, *S.* 1 (1) (*a*).

Where certain creditors on hearing of a deed of assignment executed by their debtor sent their clerk to the trustee for information of the particulars of the deed and sent in a statement of their claim, and some days after put in a petition for adjudication relying on the execution of the assignment deed as an act of bankruptcy, *held*, their delay amounted to acquiescence and they were estopped from relying on the deed as an act of bankruptcy.

JOTTINGS AND CUTTINGS.

The Budget.—There is comparatively little in the Budget of special legal interest. The proposed betting tax is a means of making the less wise—to put it mildly—contribute to the necessities of the wise. Whether it is a tax on a vice or a luxury we need not explore. Plenty will be said about it on both sides before the tax materialises, and however widespread betting may be, there are many to whom even Sir John Simon's half-crown on his golf makes no appeal. If we were

to profess pleasure at the "Raid on the Road Fund" we should lay ourselves open to rebuke from our vigilant motorist correspondents; but a levy of a few millions is a small compensation for the danger and nuisance which motoring causes as now carried on—to a large extent unlawfully, but without substantial check either from the authorities or their own Associations. Income-tax remains steady, and will do so until some at present unforeseen event occurs. Safeguarding and other protective duties are not our concern.

—*The Law Journal*, May 1, 1926, p. 396.

The Three Years' Average.—The question of the three years' average may also be regarded as of legal interest. The Chancellor of the Exchequer said that its abolition was desired by the majority of the tax-payers, and he intimated that this would be effected next year. That it is desired by tax-payers generally we doubt. That it is opposed to the wishes of traders is evident from the proceedings of the Association of British Chambers of Commerce last week, when, as reported in the *Times* of the 23rd ult., a motion to substitute a year-to-year system, based on the profits of the preceding year, was defeated by 181 to 55. No doubt, as Mr. Churchill said in his Budget speech, the Royal Commission on the Income-tax strongly recommended that the change should be made. To use their own words, they had "no hesitation in recommending it," and they gave three reasons, one being that "it seems to be almost universally desired" (*Report*, p. 105). This appears to have been a mistake. The arguments for and against the three years' system were very impartially put by Sir Edward Harrison, then Assistant Secretary to the Board of Inland Revenue, in his evidence before the Commission (Fifth Instalment of Minutes of Evidence, p.755 *et seq.*). The chief argument in favour of a change is that the assessment is brought nearer to the actual profit, and that it will facilitate unification of the various bases of assessment; the argument against is that the three years' average produces steadier results both for the tax-payer and the Exchequer. As a matter of account, the average system should be as simple as the one-year system. No doubt the matter will be fully considered before a change is made.

—*The Law Journal*, May 1, 1926, page 397.

Famous Budgets of Recent Years.—The name of Sir William Harcourt, of course, recalls the epoch-making Budget of 1894, which, for good or for evil, introduced into our fiscal

system, not indeed Death, which according to John Milton was introduced into the world by Sin, but one of the appendages of mortality, namely, Death Duties. Rates, of course, have been increased and provisions relating to Compound Settlements altered, but otherwise the main features of Harcourt's great Budget still subsist to-day, and have been a leading cause of the break-up of the great landed estates and their gradual transmission into the hands of the tenants as purchasers subject to mortgage which is so marked to-day. Mr. Asquith it was who introduced the super-tax, and for the first time distinguished between earned and unearned income for the purposes of taxation. Mr. Lloyd George's experiments in the taxation of land, since abandoned, are well known; but memories are short, and it may be useful to remind some readers that his land taxes were three in number: increment value duty; a tax on undeveloped land; a tax on reversions of leasehold property. Mr. McKenna introduced no novel taxes, but he gained a great reputation by the skill with which he adjusted the issue of Treasury bills to the market conditions: for current expenditure is met by the issue of short dated Treasury bills, which are paid usually in the last quarter of the fiscal year out of the revenue which then flows in. Sir Robert Horne's great merit as a Chancellor was his steady effort to secure the reduction of inflation and the return to the gold standard, a course to which he steadfastly adhered—to the ultimate great advantage of our national credit—notwithstanding much severe criticism of his patient economic orthodoxy in brilliant, but unsound, quarters of the Press.

—*The Law Journal*, May 1, 1926, page 397.

Professional Rewards.—The writer of a letter which appeared in *The Times* of April 29 stated that in a recent case a distinguished surgeon performed a difficult operation, and saw the patient either at his consulting room or at the nursing home some twenty-six times, for a total fee, including anæsthetist and assistant, of 165 guineas. He contrasts this with an action in the Courts which lasted half a day, and in which the fee to "a distinguished K. C." was 500 guineas, with corresponding fees to junior counsel. "These fees," says the writer, "relate to the hearing of the case only. The preliminary work was paid for separately." He goes on to ask whether it is surprising, "in view of their relative rewards, that medicine is a developing profession and the Bar one that is being increasingly dispensed with. Is it surprising that every medical student has a reasonable prospect of making a living, while

at the present moment there are literally hundreds of barristers who are unable to make a living in the Courts?" There are very many comments which might be made upon such a letter as this, but the real answer is, of course, that the two cases are not comparable at all. Such a statement as that the "preliminary work" of the leader was paid for separately, and was not included in the brief fee, is only an example of the points which show that the writer of the letter has an imperfect knowledge of the way in which the work of counsel is remunerated, whilst the fact, which is presumably considered of great importance, that the case lasted only half a day, is, of course, altogether beside the point. We cannot deal here with all the matters of interest which an attempt to compare the professional rewards of the surgeon and the lawyer raises, but we are astonished to learn that, in the opinion of a writer who signs himself "Professional Man," "the profession of the Bar is being increasingly dispensed with." That many men are called to the Bar who never intend to practise is well known, although the number of such is less than it used to be; but it is, we think, the experience of those best competent to judge that the proportion of members of the Bar who desire to make a living by the practice of their profession, and who fail, is little—if at all—greater than that of the members of other professions.

—*The Law Journal*, May 22, 1926, page 426.

Sir Thomas Erskine Holland.—The death of Sir Thomas Erskine Holland, at the age of 90, removes a figure which has long been conspicuous in the world of Jurisprudence. After gaining a fellowship at Exeter College, Oxford, he had a short experience of actual practice at Lincoln's Inn, and on the Home Circuit, but returned to his University, and in 1874 was appointed to the Chichele Professorship of International Law, a position which he held for thirty-six years, retiring in 1910. His pursuit of this subject was not merely academical. Various practical aspects of it were dealt with in the papers which he collected and published as "Essays on International Law" and he appealed to a wider public in his frequent letters to the *Times*. These were re-published as "Letters on War and Neutrality," and the third edition (1921) includes many letters written during and after the war. Thus he strongly advocated the separation of the League of Nations Covenant from the rest of the Treaty of Versailles, though it seems that President Wilson's only chance of getting the Covenant was to make it a *sine qua non* of the Treaty. Prof. Holland also rendered

important assistance to the Government in preparing a statement of the "Laws and Customs of War on Land." But he was better known to students of law by his "Elements of Jurisprudence," first published in 1880, and issued in the thirteenth edition in 1924. With a formidable rival in the late Sir John Salmond's Jurisprudence, which appeared some twenty-two years later, it has nevertheless deservedly maintained its reputation as a masterly investigation of the basis of law and of the nature and relations of legal rights. While not so hostile to Austin as some other modern jurists, Holland developed the practical side of his subject in a way Austin had never attempted. But he had far better materials on which to work. He knew his Savigny and Ihering, those great German jurists; his way was prepared by Maine and Holmes and Maitland, and—the sole survivor of a great group of legal explorers—Sir Frederick Pollock; and, wherever possible, the abstract principles which he taught were illustrated by reported decisions of the Courts. Prof. Holland's contributions to the science of law were great and valuable, and in their own sphere perhaps as noteworthy as the forensic successes of Lord Chancellor Erskine, whose great grandson through Erskine's eldest daughter, he was.

—*The Law Journal,* May 29, 1926, page 466.

Constitutional Theory and the Hertzog Claim.—In a recent speech in the South African Parliament an interesting pronouncement on Constitutional Theory, as understood in South Africa, was made by the Union Premier, General Hertzog. He claimed that ever since the Treaty of Versailles, which the self-governing Dominions signed as separate international entities, and which was followed by the allotment to them of independent national representation in the Assembly of the League of Nations, each of the British Dominions is, in International Law, an independent Sovereign State connected with the mother-country only by the fact that the Monarch of the United Kingdom is also King of Canada, Australia, New Zealand, Newfoundland, Rhodesia and the Union of South Africa. In other words, he claimed for the Dominions the same status as was possessed by Scotland between the Union of the Crown in 1603 and the Union of the Parliaments in 1707. If this theory were correct, the Imperial Parliament would have no legal powers to legislate for a Dominion —except so far as the Constitution of the Dominion confers or retains such rights—but the King and the Judicial Committee would still retain all their existing legal rights unless

and until the Dominion Parliament (with the Royal Assent) altered or abrogated these. That is practically the same claim which was put forward by the thirteen revolting American Colonies in 1772, but was declared unsound by all English constitutional authorities. These older precedents, however, according to South African constitutionalists, do not apply to the status of the Dominions since 1919 ; for the Treaty of Versailles, they claim, *by necessary implication,* although not in express terms, recognised the separate sovereignty of each Dominion, and this Treaty was ratified by an Imperial Act of Parliament. Of course, General Hertzog is not the author of this novel doctrine of Constitutional Law. It was formulated by General Smuts so long ago as 1920, and has ever since been known as " General Smuts' Theory of the Constitution ". As General Smuts is a very able and scholarly lawyer—in the opinion of Lord Shaw, as expressed in " Letters to Isabel, " one of the greatest legists of the age—the doctrine cannot be dismissed as fantastic or obviously wrong ; but most English constitutional lawyers will hesitate to accept the revolutionary view that a subordinate colony can be granted the independent status of a Sovereign State merely by " necessary implication " from the provisions of a statutory treaty.

—*The Law Journal,* May 29, 1926, page 466.

Jefferson and Hamilton : Two Lawyer-Statesmen.—Every lawyer who is interested in the literary aspects of Legal History should glance at an extremely interesting article, styled " Jefferson and Hamilton, " which appeared in the *Times Literary Supplement* of April 22. The article is nominally a review-leader on two recently published works : (1) "Life and Letters of Thomas Jefferson," by Mr. Francis Hirst; and (2) "Jefferson and Hamilton: the Struggle for Democracy in America," by Claude G. Bonds. But it is in substance a study of the part played by those two great lawyers in fixing the lines on which the American Constitution was to develop. Jefferson was a Southerner, a Virginian planter and lawyer: Hamilton was a West Indian from the small island of Nevis, who settled in New York and achieved a great forensic success in a short life, which included also a military and a political career of the first magnitude. He fell in a duel at the hand of a third lawyer, his rival, Aaron Burr, before he was thirty, but in the meantime he had drafted the Constitution of America and had succeeded in persuading thirteen independent States to unite in one semi-centralised federal government. Jefferson drafted the "Declaration of Independence"

while Hamilton was still a schoolboy, and lived to be President a quarter of century after Hamilton's death. But each played an equal part in deciding the lines along which the Constitution was built. Hamilton was an artistocrat in his political leanings, distrustful of liberty, of local government, and of the people: he would have preferred America to become a Monarchy with George Washington as the first hereditary monarch, and he succeeded in filling the Constitution with ingenious devices for preventing too rapid changes of law and for protecting the rights of property. Jefferson was a passionate democrat, and very nearly a philosophical anarchist in temperament, as well as in opinion. He distrusted the superior classes and central governments. But it was not until long after Hamilton's death that he succeeded in persuading the States, one by one (the matter being *ultra vires* the Federal Government), to abandon their restricted suffrages for a democratic franchise. The U. S. Constitution is the Grand Compromise between the ideas of those two great protagonists in the revolutionary "*Welt-Politik,*" to quote a convenient German phrase.

—*The Law Journal*, May 29, 1926, page 467.

The Lawyer-Successors of Jefferson.—It is interesting to note that nearly all Jefferson's leading ideas have been put into at least partial practice in the century since his day by American Presidents who were themselves lawyers. Jefferson's first and strongest article of faith, that all government must be based on the consent of the governed, which he derived from Algernon Sydney and introduced into the preamble of the "Declaration of Independence," led him also to advocate the election of all public officers, even Judges. This doctrine was realised, at least to a large extent, in 1826, when Andrew Jackson, of Tennessee, better known—like General Smuts, who is also a barrister—as "General" Jackson because of his services in the war against England in Canada, became President and put into operation the creed known as "Jacksonian Democracy," which later degenerated into "the spoils to the victors." Jackson also inherited Jefferson's feud with the Supreme Court, and every one remembers his famous *mot* about an anti-democratic decision of Chief Justice Marshall: "John Marshall has declared the law; now let John Marshall enforce it." Jefferson's hatred of slavery, and his desire to see it abolished. was fulfilled by the lawyer Abraham Lincoln in 1862. Jefferson's view that no territory should be annexed by America which could not in due course receive

American democratic institutions was the basis of the Lawyer-President, Grover Cleveland's, extension of semi-representative Government to Hawaii, and his advocacy of such a constitution for the Philippines, although these annexations occurred in a later Presidency. And, of course, Jefferson's ideals as to International Unity and Harmony found expression in the Covenant which we owe to a lawyer-President, Woodrow Wilson.

—*The Law Journal,* May 29, 1926, page 467.

The Plea of "Irresistible Impulse".—In *Rex* v. *Flavell* (*Times,* 13th inst.) Sir Edward Marshall Hall made a powerful appeal to the Court of Criminal Appeal to throw overboard the antiquated dogmas as to "Criminal Responsibility" laid down in *MacNaghten's case,* 1843, and to apply enlightened rules as laid down by modern medical men who are experts in psychopathology. In particular he urged the abandonment of the hopelessly unreal principle of "intellectual insanity," which is based on a psychology that has been out of date for much more than half a century, and urged that juries should be allowed to receive expert testimony as to the existence of "volitional incompetency," or as it is sometimes called "motor inhibition," popularly known by the misleading name of "Irresistible Impulse". This, however, the Court did not see its way to do; and, of course, the necessary alteration of the law is essentially a matter for legislation. Only three years ago, indeed, a Committee appointed by Lord Birkenhead, then Lord Chancellor, of which Sir Edward Marshall Hall was for some period a member, reported in favour of some far from drastic amendments of the law in this respect. These were embodied in a Bill which Lord Darling, at the request of the members of the Committee, introduced into the House of Lords, although not himself one of the reformers on this question. But that House refused to entertain the Bill. This obscurantist attitude of the Lords and of the majority of the King's Bench Judges is deeply to be regretted. "Insanity" is essentially a matter for medical expert opinion, and juries should find their verdict as to the criminal responsibility of a prisoner after hearing the medical evidence of experts and unfettered by artificial rules as to the nature of insanity invented one hundred years ago, when medical science was in its infancy, and psychological medicine was yet unborn.

—*The Law Journal,* June 17, 1926, p. 42.

BOOK REVIEWS.

THE INDIAN PENAL CODE, by Dinesh Chandra Roy, M.A., B. L., Vakil, Calcutta High Court. Published by Messrs. M. C. Sarkar and Sons. Price Rs. 10.

This is one of the valuable commentaries of the various important enactments brought out by Messrs. M. C. Sarkar & Sons. The work combines in itself all the advantages of a commentary on the Indian Penal Code useful to the student and the practitioner alike. It is not a digest type of publication giving merely references to the decided cases under the various provisions. Extracts are given from the leading judgments setting forth the principles involved in the various questions dealt with. Much of the bulk of the work is due to the fact that the author has included in his commentary copious extracts from the judgments of the highest Courts here and in England. The author has given under each section an illustration of the form of the charge under it which in many cases is a repetition of the terms of the section itself. This is sure to be found useful by the beginner in the profession, at any rate. The nature of the procedure is also given under each section as to whether an offence is cognizable, bailable, compoundable and triable by which class of Magistrates. With such practical points, the work is bound to be of great value to the practitioner. The discussion of the scope and the interpretation of the terms of the section is likely to be of particular value to the student. We have thus no doubt that the work will be greatly appreciated by all those having to do with the Criminal Law of India, especially as the author has given as appendices the various minor enactments on Criminal Law.

ELEMENTS OF THE INSOLVENCY LAW IN BRITISH INDIA, by N.B. Abuvala, B. A., LL.B., Solicitor, High Court, Bombay. Price Rs. 2-8-0.

This is a small book intended mainly for the students making their first acquaintance with the Insolvency Law in British India. The subject has not been dealt with by way of commentaries to the sections of the Provincial and the Presidency Towns Insolvency Acts but under the headings of chapters dealing with the various aspects of the law, under appropriate headings and references are given to the sections of both the Acts throughout and the differences are pointed out. The rules made by the Bombay High Court under the two Acts have been set out in the appendices; and test questions and answers are also given. We think the author has done everything necessary to make the book useful to students desirous of familiarising themselves with the subject.